

Moralization and Decriminalization of Consensual Adultery Punishment from the Perspective of Islamic Criminal Law and the New Criminal Code

Haniyah¹, Budi Handayani², Wiati Samawati³.

^{1,2,3} Universitas Sunan Giri Surabaya

¹haniyahkarsa99@gmail.com, ²budi.h@unsuri.ac.id, ³wiati.samawati94@gmail.com

* haniyahkarsa99@gmail.com

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Abstract: The reformulation of morality-based criminal offenses in the New Indonesian Criminal Code (KUHP), particularly regarding the criminalization of consensual adultery, raises questions about the limits of state intervention in the private sphere of citizens. In contrast, Islamic criminal law considers adultery (zina) as a jarimah with strong normative and theological foundations, accompanied by strict evidentiary requirements. This study compares the criminalization of adultery in the New KUHP, particularly Articles 411 and 412, with Islamic criminal law, while examining the influence of legal politics and moral value sources on both systems. The research employs a normative legal methodology with conceptual, statutory, and comparative approaches, and analyzes primary and secondary data qualitatively through systematic and contextual reading. The findings show that the New KUHP emphasizes social morality through a complaint-based offense mechanism, limiting state intervention in private matters, while still upholding moral norms. Islamic criminal law, on the other hand, treats adultery as a violation of divine and social order, but its strict evidentiary mechanisms and the principle of *dar' al-ḥudūd bi al-shubuhāt* prevent arbitrary criminalization and protect individual rights. These findings highlight the importance of balancing collective moral values, respect for private space, and legal certainty in shaping criminal policy. This study is expected to serve as a reference for national criminal law reform and to broaden cross-system understanding of the relationship between morality, individual rights, and criminalization policy.

Keywords: *Consensual adultery; New Criminal Code (KUHP); Islamic criminal law; Morality; Criminalization.*

Abstrak: Perumusan ulang tindak pidana kesusilaan dalam KUHP Baru, khususnya mengenai pemidanaan zina konsensual, kembali memunculkan pertanyaan tentang batas intervensi negara terhadap ranah privat warga. Sebaliknya, hukum pidana Islam menempatkan zina sebagai jarimah yang memiliki dasar normatif dan teologis, dengan mekanisme pembuktian yang sangat ketat. Penelitian ini membandingkan konstruksi pemidanaan zina dalam KUHP Baru, terutama Pasal 411 dan 412, dengan hukum pidana Islam, serta menelaah pengaruh politik hukum dan sumber nilai moral yang membentuk keduanya. Metode yang digunakan adalah penelitian hukum normatif dengan pendekatan konseptual, perundang-undangan, dan komparatif. Analisis dilakukan secara kualitatif melalui pembacaan sistematis dan kontekstual terhadap data primer dan sekunder. Hasil penelitian menunjukkan bahwa KUHP Baru menegaskan moralitas sosial

melalui delik aduan, sehingga intervensi negara terhadap ranah privat dibatasi, meskipun norma moral tetap ditegakkan. Hukum pidana Islam, di sisi lain, menegaskan zina sebagai pelanggaran terhadap tatanan ilahi dan sosial, namun mekanisme pembuktian yang ketat dan prinsip dar' al-ḥudūd bi al-syubuhāt mencegah kriminalisasi sewenang-wenang, sekaligus melindungi hak individu. Temuan ini menegaskan pentingnya keseimbangan antara perlindungan nilai moral kolektif, penghormatan terhadap ruang privat, dan kepastian hukum dalam pembentukan kebijakan pidana. Penelitian ini diharapkan dapat menjadi referensi dalam pembaruan hukum pidana nasional dan memperluas pemahaman lintas sistem mengenai hubungan antara moralitas, hak individu, dan kebijakan kriminalisasi.

Kata kunci: *Zina Konsensual; KUHP baru; Hukum Pidana Islam; Kriminalisasi.*

INTRODUCTION

In sentencing within the criminal justice system, it serves not only as an instrument of punishment but also reflects the moral and social values prevalent in society.¹ One issue that is of normative and philosophical concern is the regulation of consensual adultery, which refers to sexual relations between two unmarried adults. The state has an obligation to maintain public morals as part of public order, but intervention into citizens' private lives can conflict with human rights principles, particularly the right to personal freedom and sexual autonomy.²

In Indonesia, the national criminal law reform places adultery as one of the strategic issues. The enactment of the new Criminal Code in 2022 expands the scope of adultery regulation, no longer limited to extramarital relations with married partners, but also including consensual sexual relations between unmarried adults. This policy is considered a form of criminal law moralization, as the state positions itself as the protector of society's moral values, while simultaneously absorbing the legal values that exist within society.³

In the context of a pluralistic society like Indonesia, a moralistic approach to criminal law poses sociological challenges.⁴ Some segments of society that emphasize secular principles or modern law view the criminalization of consensual adultery as an excessive intervention into the private sphere and individual freedom. Meanwhile, groups that prioritize religious values as their main guide view adultery as a serious offense, requiring strict regulation and sanctions. This difference in value orientation

¹ Salman Luthan, "Dialektika hukum dan moral dalam perspektif filsafat hukum," *Jurnal Hukum Ius Quia Iustum* 19, no. 4 (2012): 506–23.

² Prayoga Teguh Karisma dan Yunita Putri Anggellina, "Konflik antara Hak Asasi Manusia dan Kepentingan Publik dalam Penegakan Hukum Pidana: Studi Kasus Kontemporer," *AL-MANHAJ: Jurnal Hukum dan Pranata Sosial Islam* 5, no. 2 (2023): 2297–2306.

³ Lidya Suryani Widayati, "Kebijakan Kriminalisasi Kesusilaan Dalam Rancangan Undang-Undang Tentang Hukum Pidana dari Perspektif Moral (Criminalization Of Decency In The Criminal Code Bill From Moral Perspectives)," *Negara Hukum: Membangun Hukum Untuk Keadilan dan Kesejahteraan* 9, no. 2 (2019): 181–98.

⁴ Ericca Dian Novitasari, "Analisis sistem hukum zina dalam undang-undang Republik Indonesia nomor 01 tahun 2023 tentang kitab undang-undang hukum pidana perspektif fiqh jinayah" (IAIN Kediri, 2023).

highlights the complexity of criminal law enforcement, where legal norms must balance the protection of collective moral values, individual autonomy, and social justice.⁵

The perspective of Islamic criminal law adds another dimension to this discourse. In Islamic criminal law, adultery is categorized as a *ḥadd* crime, which is a violation of God's rights with penalties that have been normatively and theologically established through religious texts. However, the implementation of these sanctions is extremely strict because it requires almost impossible proof, such as repeated confessions or the testimony of four just male witnesses.⁶ This provision opens the door to *ijtihad*, allowing for a more preventive and rehabilitative legal approach rather than a repressive one.

Tension between Islamic criminal law and modern positive criminal law arises not solely from differences in reasoning methods, but from the fundamental character of the two systems. Islamic criminal law is normative-theological with moral-religious legitimacy, while modern criminal law is designed to be applied directly by the state.⁷ In the context of Aceh, some provisions of Islamic law have been codified through *Qanun Jinayat*, thus demonstrating the practical intersection between two normative frameworks.⁸

Empirically, the application of the adultery article in Indonesia shows disparities. Although this offense is subject to complaint, in some areas a selective or discriminatory pattern is evident, particularly against women. In regions that enforce Sharia regulations, such as Aceh, the punishment for adultery follows the *Qanun Jinayat*, resulting in a more intensive pattern of law enforcement compared to other areas. This condition raises questions about the consistency of protecting citizens' rights and the relationship between national criminal law and religious-based local law.⁹

Classical Islamic criminal law also affirms adultery as a serious offense with *ḥadd* sanctions and strict proof requirements. However, the application of this punishment reveals a complexity not found in positive law, encompassing the interaction between normative texts, jurisprudential interpretation, and social reality. Tensions arise between universal values such as the right to privacy, bodily autonomy, and sexual freedom, and particular values like modesty and religious morality, creating a tug-of-war in the punishment of adultery.¹⁰

In the new Criminal Code, the regulation of consensual adultery does not only depend on legal-formal construction, but also considers Article 2 paragraph (1), which

⁵ H Iwan Rasiwan, *Asas Keseimbangan KUHP Baru Cermin Nilai Pancasila dalam Penegakan Hukum* (Takaza Innovatix Labs, 2025).

⁶ Syamsul Huda, "Zina dalam Perspektif Hukum Islam dan Kitab Undang Undang Hukum Pidana," *HUNAFI Jurnal Studia Islamika* 12, no. 2 (2015): 377-97.

⁷ Muhammad Adnan Lutfi et al., "Studi Perbandingan Tentang Penetapan Sanksi Pidana Pencurian Berdasarkan Hukum Pidana Positif Indonesia dan Hukum Pidana Islam," *Borobudur Law and Society Journal* 1, no. 1 (2022): 20-30.

⁸ Rya Elita Br Sembiring et al., "Analisis Tindak Pidana Perzinahan Dalam Pembaharuan Hukum Pidana dan Qanun Jinayat di Aceh," *Iblam Law Review* 4, no. 2 (2024): 62-68.

⁹ Saiful Hadi, "Ketentuan Sanksi terhadap Pelaku Tindak Pidana Zina dalam KUHP dan Qanun Hukum Jinayat" (UIN Ar-Raniry, 2022).

¹⁰ Sahran Hadziq, "Pengaturan tindak pidana zina dalam KUHP dikaji dari perspektif living law," *Lex Renaissance* 4, no. 1 (2019): 25-45.

recognizes the law that lives within society. This places the issue of adultery punishment in a tug-of-war between moral values, human rights principles, and criminal law policies that are responsive to social diversity and democracy. The changes to the new Criminal Code, which expand the scope of punishment for consensual adultery, have sparked public and academic controversy. This regulation is considered a form of criminal law moralization, aligning positive law with local cultural and religious values, but potentially conflicting with modern criminal law principles such as ultima ratio, non-discrimination, and human rights protection.¹¹

The dynamics of regulating consensual adultery in the new Criminal Code emphasize the need to reexamine the relationship between morality, law, and individual rights. The formulation of the offense indicates that the legislator chose an approach containing elements of moralism, which differs from Islamic criminal law that places the prohibition of adultery within a normative Sharia framework. This normative difference is an important basis for assessing the protection of individual rights when criminal law is used to regulate private actions with moral implications. In a pluralistic society and a democratic state, discussing the limits of state intervention becomes crucial to balance public interests, morality, and personal autonomy. This research comprehensively examines the construction of these norms, providing a proportional overview of the moralization and potential decriminalization of consensual adultery from the perspectives of Islamic criminal law and the new Criminal Code.¹²

This research stems from the need to understand how the state and religious law view and regulate consensual adultery. The first question focuses on the construction of the arrangements in the new Criminal Code, particularly how the criminalization of consensual adultery is built and the extent to which this policy is driven by considerations of legal morality. This is important because the expansion of the crime of adultery not only indicates a shift in criminal policy direction but also reflects how the state places public morality in lawmaking. The second question is directed at understanding the concept of adultery in Islamic criminal law, including its very strict evidentiary requirements, which in practice make it difficult to apply sanctions. This mechanism of proof demonstrates that Islamic criminal law has a normative logic different from positive law, while also serving as a natural limit against excessive criminalization.

Furthermore, this study aims to examine the fundamental similarities and differences between the two legal systems. Both the new Criminal Code and Islamic criminal law view adultery as a morally charged behavior, but they have different philosophical foundations, methods of formulating norms, and purposes of punishment. This analysis is necessary to understand the extent to which the two systems can complement each other or are actually in opposite directions. In the midst of Indonesia's pluralistic society, it is important to examine whether these two approaches can be integrated without sacrificing individual rights and principles of justice, or whether there

¹¹ Iwan Rasiwan, *Asas Keseimbangan KUHP Baru Cermin Nilai Pancasila dalam Penegakan Hukum*.

¹² Aldi Rizki dan Rospita Adelina Siregar, "Tantangan Perubahan Dan Perkembangan KUHP Baru di Indonesia," *Jurnal Hukum Mimbar Justitia* 11, no. 1 (2025): 205-17.

is tension that is difficult to bridge. The research has a clear conceptual foundation for examining the relationship between morality, positive criminal law, and Islamic criminal law in the issue of consensual adultery.

This research employs a juridical-normative approach with a comparative method, focusing on a critical analysis of primary and secondary legal sources. Specifically, the research examines Indonesia's new Criminal Code regarding the regulation of consensual adultery and compares it with Islamic criminal law as outlined in the Quran, hadiths, and related fiqh literature. The analysis was conducted systematically to identify the normative constructions, rationality, and legal objectives underlying each system. Primary legal sources include laws, government regulations, and Islamic legal texts, while secondary sources encompass academic literature from reputable national journals and scientific books. The analysis process was conducted qualitatively, with the following stages: first, inventorying and classifying the norms of adultery punishment in each legal system; second, comparing the substance, rationality, and underlying principles of these regulations; and third, evaluating the opportunities for harmonization and potential normative conflicts between positive law and Islamic criminal law. With this approach, the research not only describes the differences between the two legal systems but also assesses the social, legal, and human rights implications arising from the policy of regulating consensual adultery, while also offering insights for the development of fair and contextualized models of punishment.

DISCUSSION

Moralization and the Space for Decriminalization in the Regulation of Consensual Adultery in the New Criminal Code

The reform of criminal law thru Law Number 1 of 2023 concerning the Criminal Code has reignited fundamental debates regarding the relationship between morality, state power, and individual freedom. One of the most controversial issues lies in the recriminalization of consensual adultery thru Articles 411 and 412 of the New Criminal Code.¹³ Article 411 stipulates that anyone who engages in sexual intercourse with someone who is not their husband or wife may be punished, provided that the act is prosecuted based on a complaint from the husband, wife, parents, or children of one of the parties involved. The essential elements of this article include the act of sexual intercourse, performed by two unmarried individuals, occurring on a mutual basis, and its enforcement depending on a report from a specific party. Such a construction places the article as an absolute complaint offense, where legal proceedings cannot proceed without a complaint from the party socially or morally harmed.¹⁴

¹³ Undang-undang No 1 Tahun 2023 Pasal 411 KUHP (1): "Setiap orang yang melakukan persetubuhan dengan orang yang bukan suami atau istrinya, dipidana dengan pidana karena perzinahan dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori II", dan Pasal 412 ayat (1) KUHP "mengatur setiap orang yang melakukan hidup bersama sebagai suami istri di luar perkawinan dipidana dengan pidana penjara paling lama 6 bulan atau denda paling banyak kategori II,"

¹⁴ Bayu Bramantyo, Muhammad Iftar Aryaputra, dan Ani Triwati, "Formulasi delik zina dalam rancangan KUHP," *Semarang Law Review (SLR)* 1, no. 1 (2020): 16–29.

In the study of criminal law, philosophers and criminal law experts understand moralization in different ways. Devlin saw public morality as the glue of society, so the state was considered justified in intervening when that value was deemed threatened. Duff viewed punishment as a moral call for someone to take responsibility for their choices. Conversely, Husak believes that criminal law should not be used to regulate morality, but only to prevent actions that truly cause harm. Simester and Von Hirsch then asserted that not all behaviors considered immoral are worthy of punishment, unless they disrupt the basic order of society.¹⁵ In the Indonesian context, moralization is evident in the use of the concept of "decency" in the Criminal Code, which reflects societal moral values and serves as the basis for the state to restrict personal behavior, including in the issue of consensual sexual relations. Thus, moralization is the state's way of maintaining order and social identity thru criminal law.¹⁶

Understanding the various approaches to moralization is crucial before assessing the New Criminal Code's steps in regulating consensual adultery. This framework provides a basis for examining how the state negotiates the boundary between the moral values held by society and the space for individual freedom. In the Indonesian context, the main question is not simply whether extramarital sexual relations are considered immoral, but how the state chooses to make them the subject of criminal regulation. Therefore, before analyzing complaint offenses and the scope of decriminalization, it is first necessary to understand how the norms of morality and the majority's morality are translated into the criminal policy of the New Criminal Code.¹⁷

It is important to assess whether the complaint offense mechanism applied in Articles 411 and 412 can be read as a compromise between public morality and private freedom. On the one hand, the requirement for complaints to come from legal spouses or close family seems like an attempt by the state to restrain itself from completely intruding into citizens' personal space. However, on the other hand, the existence of complaint offenses does not change the fact that the state still considers consensual sexual relations outside of marriage as morally punishable behavior. Complaint handling is more accurately understood as an administrative limitation on criminal enforcement, rather than a step toward true decriminalization. In fact, when considering the expansion of the definition of legal subjects and the scope of their behavior, the New Criminal Code actually strengthens the criminalization of adultery compared to the previous regime. This indicates that the "relaxation" seen thru the complaint scheme does not actually reduce the moralistic content of this article, but rather only shifts control of criminalization into the hands of certain parties within the family circle in the domestic sphere.¹⁸

¹⁵ Mohammad Kemal Dermawan dan Mohammad Irvan Oli, *Sosiologi peradilan pidana* (Yayasan Pustaka Obor Indonesia, 2015).

¹⁶ Hans Tangkau, "Hukum Pembuktian Pidana," 2012.

¹⁷ Nailur Rahmi, "Hukum Pidana Indonesia dan Relevansinya dengan Hukum Pidana Islam," *Islamika: Jurnal Ilmu-Ilmu Keislaman* 23, no. 1 (2023): 1-18.

¹⁸ Ratna Putri Meina, "Tinjauan Hukum Pidana Islam terhadap tindak pidana Zina dalam pasal 284 KUHP lama dan pasal 411-413 KUHP baru" (UIN Sunan Gunung Djati Bandung, 2023).

Although the use of complaint offenses is often seen as a form of decriminalization, this mechanism does not actually eliminate the moralizing logic underlying the existence of this article. On the one hand, complaint offenses can be understood as a form of conditional criminal regulation, where the state refrains from interfering too deeply in citizens' private lives.¹⁹ However, from another perspective, the substance of the article indicates that the state still holds the normative assessment that consensual sexual relations outside of marriage are a form of wrongdoing worthy of being addressed thru criminal instruments. This is where the tension lies between the boundaries of decriminalization and the moralizing impulse that seeks to be institutionalized into positive law. From the perspective of criminalization theory, the existence of this norm directly intersects with the classic debate between legal moralism and the harm principle. The state has the right to uphold public morality if a behavior is considered to threaten social cohesion. Criminalization should be limited to actions that cause real harm or at least constitute a serious offense against public order (the offense principle).²⁰

The explanation of the adultery article in the new Criminal Code also shows the transformation of majority moral values into legal norms. Once these moral values are made positive, they no longer stand as mere ethical values, but become enforceable standards of behavior thru criminal sanctions. This process of transformation is what is meant by the moralization of criminal law, where the state adopts the moral values of society, particularly the dominant ones, and then gives them legal legitimacy to restrict individual behavior. This phenomenon shows that the revision of the Criminal Code not only serves as a process of recodification, but also as a medium to strengthen certain moral positions as the basis for state intervention.²¹

The existence of complaint offenses as a prerequisite for punishment brings complex dynamics. On one hand, this mechanism is intended as a limitation to prevent the state from immediately entering the intimate space of its citizens. However, in practice, the complaint system can actually open up a very wide space for subjectivity, both for the reporter and law enforcement officers. Empirical evidence from various cases shows that similar norms are often used as tools to resolve domestic conflicts, pressure partners, or even discriminate against vulnerable groups, particularly women. Without the principle of proportionality and the protection of privacy rights, the use of this article could lead to forms of selective criminalization that are contrary to substantive justice.²²

The criminalization of consensual adultery raises serious questions about the limits of state intervention in private life. Punishing actions that do not cause real harm

¹⁹ Miftahul Jannah Matondang, "Delik Zina Dalam Perspektif Hukum Islam, KUHP dan RKUHP," *Jurnal Landraad* 1, No. 2 (2022): 132–38.

²⁰ Novianto Sanjaya, "Batasan Negara Untuk Menentukan Tindak Pidana Dalam Perspektif Teori Kontrak Sosial," *Sapientia et Virtus* 5, No. 1 (2020): 1–20.

²¹ Mahrus Ali dan Muhammad Abdul Kholiq, "Adopsi Nilai dan Prinsip Hukum Pidana Islam tentang Delik Kesusilaan Zina dalam Kitab Undang-undang Hukum Pidana Nasional," *Jurnal Hukum Ius Quia Iustum* 30, No. 3 (2023): 622–49.

²² Sirajuddin Sirajuddin, Risdayani Risdayani dan Dewi Indriani, "Delik Aduan Tindak Pidana Perzinahan dalam Pandangan Hukum Pidana dan Hukum Islam," *Bustanul Fuqaha: Jurnal Bidang Hukum Islam* 5, No. 2 (2024): 359–72.

essentially pushes the state into a space that should be the domain of individual autonomy. When this provision is classified as an offense against morality, the state sends a strong signal that sexual behavior outside of marriage is still considered disruptive to the moral order of society, even if it is consensual.²³

This condition creates ambiguity where the mechanism of private prosecution seems to offer privacy, but in practice, it actually opens the possibility of family matters entering the legal process. In various cases, this provision also has the potential to be a tool for pressure or resolving domestic conflicts, so the decision to report is more determined by power dynamics within the family than by the principle of objective legal protection.²⁴

The normative consequences of this criminalization also impact the burden on law enforcement agencies. They are faced with a dilemma between upholding established norms and maintaining respect for private rights. This condition not only has implications for the effectiveness of law enforcement, but also for the legitimacy of the law itself. In an increasingly pluralistic society, applying criminal norms based on the morality of the majority has the potential to deepen social fragmentation and increase resistance to the law.

This overall dynamic shows that the regulation of adultery in the new Criminal Code not only reflects a choice in criminal policy but also reveals the tension between moral conservatism and the demand for respect for individual freedom. The complaint mechanism does not change the moralistic character of the norm; it merely shifts control of criminalization to the family circle. Therefore, a study of this article requires a broader approach, not merely a dogmatic one, but also encompassing legal-political, sociological, and human rights perspectives, in order to assess the extent to which the regulation aligns with the principles of substantive justice and the protection of private space in a democratic legal state.²⁵

The Nature of Proving Adultery in Islamic Criminal Law as a Mechanism for Covert Decriminalization

Islamic criminal law (*fiqh jinayah*) treats adultery as a serious offense punishable by hudud sentences. However, what stood out was not the severity of the sanctions, but rather the extremely strict mechanism for proving guilt. Zina can only be punished if there are four just male witnesses who directly witnessed the act of intercourse, or thru voluntary confession repeated by the perpetrator. With standards that are almost impossible to meet, many cases ultimately cannot be brought to the criminal realm. In practice, this mechanism functions as a normative brake on criminalization, and can

²³ Triadi Triadi, "Perbandingan Hukum Zina Dalam Hukum Islam Dengan KUHP," *Ensiklopedia of Journal* 5, no. 2 (2023): 255–59.

²⁴ Bramantyo, Aryaputra, dan Triwati, "Formulasi delik zina dalam rancangan KUHP."

²⁵ Suaib Lubis dan Syahrul Affan, "Hukuman Bagi Pelaku Zina Menurut Hukum Islam Ditinjau Dari Hak Asasi Manusia," *Stigma Jurnal Ilmu Sosial Politik dan Humaniora* 1, No. 2 (2022): 1–6.

therefore be seen as a form of decriminalization by procedure – a covert decriminalization that occurs thru evidentiary requirements.²⁶

This very high standard of proof not only serves as a procedural technique but also reflects the principle of protecting the privacy, honor, and dignity of individuals. When the evidence is not strong enough, the case must be dropped, even if the action is considered morally wrong. This approach aligns with the principle of ultima ratio, which states that criminal law is only used when a violation can be objectively and fairly established.²⁷ In other words, Islamic criminal law does not encourage the state to monitor the private sphere, but rather sets clear boundaries to prevent arbitrary punishment.²⁸

Beside hudud, Islamic criminal law recognizes the concept of ta'zir, which are flexible sanctions left to the discretion of the judge or authority. In the context of adultery, ta'zir allows for the contextual assessment of cases, considering the perpetrator's intent, the harm caused, or the social impact. This flexibility allows rulers to avoid always imposing repressive sanctions. Thus, the existence of ta'zir expands the potential for covert decriminalization, as sanctions can be directed toward education or correction, rather than absolute punishment.²⁹

Theoretically, this high standard of proof presents a balance between the effort to maintain public morality and the protection of private rights. Adultery is still viewed as a threat to social order, but the application of punishment is strictly limited to prevent arbitrariness. This concept aligns with the idea that morality can be the basis of law, but it should not close the space for protecting individuals from excessive state intervention.³⁰

As a public offense, the state is authorized to prevent adultery in order to uphold the objectives of Islamic law (maqāṣid), particularly the protection of offspring (ḥifẓ al-nasl). However, that authority is limited by the very high standard of proof for hudud. The requirement of four male witnesses who directly witnessed the act or voluntarily confessed essentially makes the private sphere less susceptible to state or societal interference. The principle of "avoiding hudud when there is doubt" (dar' al-hudūd bi al-syubuhāt) emphasizes that even the smallest doubt should invalidate punishment.³¹

²⁶ Lade Sirjon, "Kriminalisasi Delik Perzinahan Dalam Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 12, No. 1 (2023): 53–67.

²⁷ Elwi Danil, "Penerapan Prinsip Ultimum Remedium Terhadap Tindak Pidana Administrasi," *Jurnal Hukum Pidana Dan Kriminologi* 1, no. 1 (2020): 1–16.

²⁸ Julia Rahmayanti Siahaan, "Sistem Pembuktian Tindak Pidana Perzinaan Dalam Perspektif Hukum Pidana Positif Dan Hukum Pidana Islam," *Al-Qanun: Jurnal Kajian Sosial dan Hukum Islam* 1, No. 1 (2020).

²⁹ Suhaizad Saifuddin, "Analisis Pemakaian Darjah Pembuktian Bagi Kesalahan Hudud di Bawah Enakmen Jenayah Syariah di Malaysia: Analysis Of Applied The Standard Of Proof For Hudud Offences Under The Shariah Criminal Enactment In Malaysia," *Journal of Shariah Law Research* 6, No. 1 (2021): 89–108.

³⁰ Aisyah Cinta Putri Wibawa aisyah et al., "Keselarasan Hukum Islam dengan Hukum Nasional dalam Perspektif Penyelesaian Tindak Pidana Zina di Indonesia," *Khuluqiyya: Jurnal Kajian Hukum dan Studi Islam* 5, no. 1 SE-Articles (28 Januari 2023): 92–107, <https://doi.org/10.56593/khuluqiyya.v5i1.99>.

³¹ Nurvilla Paputungan dan Mukran H Usman, "Penerapan Had Zina pada Muḥṣan dan Gairu Muḥṣan Menurut Mazhab Syafii dan Hambali: The Implementation of Ḥad Punishment for Adultery on Muḥṣan and Ghayr Muḥṣan According to the Shafi 'i and Hambali Schools of Thought," *AL-MABSUTH: Jurnal Studi Islam dan Bahasa Arab* 1, No. 2 (2025): 565–84.

The prohibition of spying (tajassus) and the criminal threat against false accusations of adultery (qadzaf) also reinforce the message that protecting someone's reputation and privacy is far more important than proving adultery itself. Thus, strict proof is not a weakness, but rather a normative design to prevent excessive criminalization. This scheme confirms that Islamic law limits public intervention to prevent it from infringing on individuals' private rights.³²

Compared to the New Criminal Code, the fundamental differences are clear. The complaint provisions in Articles 411–412 appear to be a form of decriminalization, but in substance, they still place the state as the enforcer of majority morality. Conversely, Islamic criminal law limits state intervention thru strict evidentiary procedures. Regarding the same act, which is consensual fornication, theoretically it is a violation, but in Islamic law, it is more difficult to reach a punishment. This is where the function of proving hudud as a mechanism for covert decriminalization lies, indirectly preserving private space even tho public morality is recognized as an important value.

In judicial practice, the standard of proof for adultery often presents a dilemma, especially when there is moral pressure from the community to punish the perpetrator. However, this approach can actually serve as an inspiration for the formulation of modern criminal policy, emphasizing that law enforcement should not sacrifice a person's privacy and dignity without truly strong evidence.³³ This model focuses on the certainty and integrity of the evidence, rather than on enforcing the morality of the majority. Strict proof also minimizes the potential for discriminatory criminalization. Unlike the new Criminal Code's complaint-based offense scheme, which can be used to pressure certain parties in domestic conflicts or power relations, the hudud standard eliminates the possibility of such abuse. Without four witnesses or a voluntary confession, the case cannot proceed until the law is no longer an instrument of revenge or excessive social control.

Ultimately, the character of proof in Islamic criminal law demonstrates that enforcing morality does not have to be done repressively and does not have to aggressively enter the private sphere. This mechanism aligns with the criminal law minimalism approach, which is the idea that criminal law should only be used for behavior that causes real harm. Thus, Islamic criminal law offers a model that refrains from over-criminalization, preserving society's moral values without sacrificing the principles of justice, proportionality, or privacy protection.³⁴

Normative Comparison: Adultery as a Crime in the New Criminal Code and Islamic Criminal Law

Zina as a criminal offense reflects how a legal system interprets morality and social values. However, the approaches of the New Criminal Code and Islamic criminal law in

³² Sembiring et al., "Analisis Tindak Pidana Perzinahan Dalam Pembaharuan Hukum Pidana dan Qanun Jinayat di Aceh."

³³ Muhammad Izzul Aulia, "Kebenaran Materiil Dalam Pembuktian Tindak Pidana Zina (Overspel)." (Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta, n.d.).

³⁴ Mahrus Ali dan M Arif Setiawan, "Teori Hukum Pidana Minimalis dari Douglas Husak: Urgensi dan Relevansi," Undang: Jurnal Hukum 4, no. 1 (2021): 245–79.

handling adultery have significant differences. In the new Criminal Code, Articles 411 and 412 classify adultery as a limited complaint offense. This means that legal proceedings can only take place if reported by the perpetrator's legal spouse or close family. With this mechanism, the state seeks to balance the public interest in upholding morality while respecting citizens' private space.³⁵

Meanwhile, Islamic criminal law places adultery within the category of *ḥudūd*, which is not merely a violation against humanity, but also against the rights of God (*ḥaqq Allāh*).³⁶ Therefore, the standard of proof is very strict. Punishment can only be applied if there are four just male witnesses who witnessed the act directly or if the perpetrator voluntarily admits to the act. This standard aims to protect individuals from unfair criminalization while ensuring that the application of criminal law does not become an arbitrary instrument.

The fundamental difference lies in the legal basis of legitimacy underlying each system. The new Criminal Code operates within a secular legal framework, formed thru socio-political consensus and practical considerations in maintaining societal moral values. On the other hand, Islamic criminal law is rooted in the texts of Sharia and the principles of *Fiqh*, which define adultery as a serious offense with transcendental dimensions. This difference indicates that the New Criminal Code tends to adapt the law to socio-political pressure, while Islamic law maintains religious normative principles.

Additionally, differences are also evident in the details of the offenses and their mechanisms of proof. The new Criminal Code does not distinguish between married (*muḥṣan*) and unmarried (*ghair muḥṣan*) perpetrators, and its evidentiary requirements are not as strict as Islamic criminal law. In criminal jurisprudence, the marital status of the perpetrator determines the severity of the punishment, which is stoning for a married person (*muḥṣan*) and one hundred lashes for an unmarried person (*ghair muḥṣan*). Proof in Islamic law requires direct testimony from four witnesses or repeated confession from the perpetrator, while the New Criminal Code only requires a report from the relevant party and proof according to the general procedures of the Criminal Procedure Code.³⁷

At first glance, both systems seem to criminalize adultery equally. However, upon closer examination, there are fundamental differences in how they view and handle the act. The new Criminal Code uses complaint offenses to respond to societal moral pressure, but still ensures that state intervention does not completely penetrate the private sphere. Conversely, Islamic criminal law, while affirming that adultery is a serious offense, actually provides a high degree of protection for individuals thru strict evidentiary requirements. The principle of "*dar' al-ḥudūd bi al-syubuhāt*" (averting punishments

³⁵ Mia Amalia, Frans Reumi, dan Kiki Kristanto, *Kitab Undang Undang Hukum Pidana Tahun 2023* (PT. Sonpedia Publishing Indonesia, 2025).

³⁶ Kahar Muzakir, "Zina Dalam Perspektif Hukum Islam Dan Kitab Undang Undang Hukum Pidana," *Formosa Journal of Science and Technology* 1, no. 1 (2022): 33–46.

³⁷ Dian Andriasari, "Studi Komparatif Tentang Zina Dalam Hukum Indonesia Dan Hukum Turki," 2025.

based on doubt) avoids punishment if there is uncertainty, affirming that punishment is not the primary goal, but the final step when evidence is certain.³⁸

Thus, the difference between the New Criminal Code and Islamic criminal law lies not only in the type of sanctions, but also in the underlying philosophy and purpose of the law. The new Criminal Code emerged from socio-political dynamics and modern legal systems, while Islamic criminal law emphasizes individual protection and adherence to moral-transcendental values. Understanding this context is important so that the assessment of both legal systems is not solely focused on the severity or leniency of the sanctions, but also considers the historical, philosophical, and social context of each.³⁹

Overall, a comparison between the New Criminal Code and Islamic criminal law shows that defining adultery as an offense cannot be understood solely from the perspective of sanctions. The New Criminal Code emphasizes adherence to the moral values of the majority thru the mechanism of reporting offenses, but it still places limitations on the individual's private sphere. Conversely, Islamic criminal law emphasizes morality and religious observance, but strict evidentiary procedures create a space for individual protection, preventing arbitrary criminalization. Thus, both legal systems have different ways of balancing public interest and privacy rights, demonstrating that the application of criminal law should always consider social, historical context, and the principle of justice.⁴⁰

Both the New Criminal Code and Islamic criminal law emphasize the importance of proportionality in criminal law. In the context of updating the Criminal Code or developing criminal law policies, this principle of limiting criminalization can serve as a reflection for legislators to create laws that are just, respect privacy, and wisely uphold society's moral values. In other words, this comparative discussion emphasizes that criminal law not only serves to punish, but also as an instrument for protecting individual rights. The approach of the New Criminal Code and Islamic criminal law provides an important lesson that enforcing morality thru law must always be accompanied by the principles of justice, certainty of evidence, and respect for private space, so that it does not become a form of excessive or repressive criminalization.

CONCLUSION

Based on the discussion, it can be concluded that the criminalization of adultery in the New Criminal Code and Islamic criminal law has different bases, mechanisms, and implications. The New Criminal Code classifies adultery as a complaint offense, meaning legal intervention only occurs if there is a reporter from a specific party. This approach

³⁸ Rienlady Nata dan Wismar Ain, "Perbandingan zinah (overspel) dalam Kitab Undang-Undang Hukum Pidana (KUHP) dan zinah (hubungan luar kawin) dalam hukum Islam," *Lex Jurnalica* 12, no. 1 (2015): 146304.

³⁹ Ahmad Wildan Rofrofil Akmal dan Rani Nur Azizah, "Rekonstruksi Tindak Pidana Zina Berbasis Masalah dalam KUHP Indonesia Perspektif Teori Keadilan John Rawls," *SUPREMASI: Jurnal Hukum* 7, no. 2 (2025): 194–211.

⁴⁰ Mohamed Badara dan Masaki Nagatab, "Modern Extremist Groups and the Division of the World: A Critique from an Islamic Perspective," *Arab Law Quarterly* 31, no. 4 (2017): 305–35, <https://doi.org/https://doi.org/10.1163/15730255-12314024>.

reflects the state's effort to balance the moral pressure of the majority with the protection of individual's private sphere, but it still has the potential to lead to legal abuse in the social-domestic context.

Meanwhile, Islamic criminal law defines adultery as a *ḥudūd* offense with very strict standards of proof, such as requiring four righteous witnesses or the voluntary confession of the perpetrator. This mechanism indirectly limits arbitrary criminalization and provides protection for individual rights, while still upholding moral values and public interests. The principle of "dar' al-hudud bi al-syubhat" further emphasizes that punishment can only be applied when certainty of evidence is achieved, thus Islamic criminal law creates a model of veiled decriminalization that respects privacy and justice.

This normative comparison shows that criminal law not only serves as an instrument for enforcing morality but must also consider context, proportionality, and individual rights. In the practice of updating the Criminal Code, the principles contained in Islamic criminal law can serve as a basis for reflection so that the criminalization of consensual adultery does not become merely an instrument of majority morality, but also guarantees legal certainty, justice, and the protection of citizens' private space.

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